UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc.	**)**	**Docket No. EL00-62-026**
	)	
ISO New England Inc.	**)**	**Docket No. EL00-62-015**

JOINT MOTION TO CONSOLIDATE PROCEEDINGS

Pursuant to Rule 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission, 18 C.F.R. §§ 385.212 (2000), the Maine Public Utilities Commission; Bangor Hydro-Electric Company; Central Maine Power Company; the Massachusetts Attorney General; National Grid USA; Alternate Power Source, Inc.; the Public Advocate, State of Maine;[1] Central Vermont Public Service Corporation and the Vermont Department of Public Service (collectively, "Movants") hereby move to consolidate the above-captioned proceedings. As discussed below, Movants request the consolidation of the case remanded by the United States Court of Appeals for the First Circuit in Docket No. EL00-62-015 with ISO New England Inc.'s ("ISO-NE" or "the ISO") proposed restructured interim Installed Capability ("ICAP") charge filing made on June 4, 2001 in Docket No. EL00-62-026. Further, the Movants request that, on remand, the Commission expeditiously address the merits of the ISO's June 4th filing. Finally, Movants emphasize their view that the Commission should not change the current deficiency charge until August 1, 2001, the requested effective date of the ISO's proposed replacement ICAP charge, or such other later date ordered by the Commission.

[1] The motion to intervene of the Public Advocate, State of Maine in Docket EL00-62-015 was denied by the Commission. The Public Advocate has moved to intervene in Docket No. EL00-62-026.

I. INTRODUCTION

On June 4, 2001, ISO-NE filed a compliance report and also filed, pursuant to section 6.17 of the ISO Interim Agreement, proposed revisions to the Market Rules to implement a restructured interim ICAP product effective August 1, 2001. The ISO's filing is in response to the Commission's March 6, 2001 Order on Rehearing in which it invited the ISO to propose, within 90 days of the March 6th Order, an alternate deficiency charge to the Commission-ordered $8.75 charge. *ISO New England Inc.*, 94 FERC ¶ 61,237 at 61,847 (2001) ("March 6 Order").[2]

On June 8, 2001, the First Circuit Court of Appeals issued its Order on petitions for review of the Commission's December 15, 2000 and March 6, 2001 Orders regarding the determination of an ICAP deficiency charge. *Central Maine Power Co. v. FERC*, No. 01-1376 *et al.* (1st Cir. June 8, 2001).[3] The Court remanded the case to the Commission. The Court left several options open to the Commission:

> In remanding, we leave open to FERC's informed judgment the decision whether to conduct further proceedings (and if so, what kind) or whether simply to write a further decision on reconsideration. Nor do we preclude FERC from modifying the outcome if it is so advised. No time limit need be imposed at this time. If FERC unduly delays, any party to this case may apply to us for an order fixing a deadline for agency reconsideration.

Id., slip op. at 32. The Court further directed that, if on remand the Commission retained the $8.75 charge, it was required to address certain issues raised by the petitioners. In particular, the Commission is to address why a substantial ICAP charge is still required; why $8.75 is the proper interim figure; and why alternatives before the Commission are inadequate or should not

[2] On March 30, 2001, after the Court of Appeals for the First Circuit stayed the effect of the $8.75 charge, the Commission ordered that the $0.17 deficiency charge proposed by the ISO on July 28, 2000 "shall remain the deficiency charge pending further court order." *ISO New England Inc.*, 94 FERC ¶ 61,406 (2001).

[3] The Court's opinion is available at http://www.ca1.uscourts.gov/pdf.opinions/01-1376-01A.pdf.

be considered by the Commission at this time. *Id* at 30. The Court lifted the stay of the $8.75 charge, allowing (but not requiring) the Commission to impose the charge prospectively. *Id.* at 32-33. Further, the Court retained jurisdiction over the case and required the Commission to file status reports every 45 days from the date of the decision. *Id.* at 32.

II. ARGUMENT

A. Consolidation of these Cases is Appropriate Because Both Require the Commission to Determine the Most Appropriate Interim ICAP Charge Applicable Prospectively

Consolidation is appropriate where proceedings involve common issues of fact and law. *Louisiana Public Service Commission v. Entergy Services, Inc.*, 93 FERC ¶ 61,013 at 61,026 (2000) (consolidating remand of earlier decision with new complaint raising similar issues). Here, the issues raised in the remand of the Commission's earlier ICAP Orders and the ISO's restructured Interim ICAP proposal are the same. In both cases, the Commission must determine what is the most appropriate interim ICAP charge on a going forward basis.

Indeed, the ISO's filing is in response to the Commission's invitation in its March 6 Order to file a charge to replace the $8.75 charge. In that Order, the Commission stated its belief that the $8.75 charge was not "the only just and reasonable ICAP charge that can be developed." *ISO New England Inc.*, 94 FERC at 61,847. Accordingly, the Commission invited the ISO to propose a different ICAP deficiency charge within 90 days of the date of the Order. *Id.* Thus, the Commission intended the $8.75 charge only as an interim measure – one that now can be replaced by the new proposal filed by ISO in accordance with the Commission's invitation.

The interim nature of the $8.75 charge was, in fact, made clear by the Commission in pleadings before the First Circuit. There, it argued in response to petitioners' Motion for a Stay of the $8.75 charge, that petitioners had overestimated the degree of harm that would be imposed by the interim $8.75 charge: "[t]he 12 months used in that [Bangor Hydro's] calculation must be

reduced to three months to reflect the Commission's indication that a new ICAP charge be in place within 90 days." *Bangor Hydro Electric Co. v. FERC*, No. 01-1377, "Opposition of Federal Energy Regulatory Commission to Motion for Stay Pending Review" at 7 (1st Cir. March 22, 2001). The Commission further stated that it had "pressed the ISO to propose a different deficiency charge 'within 90 days of the date of this order,' so as to assure the $8.75 charge would truly be interim," *id.* at 5, and concluded:

> Finally, it should also be recognized that any alleged harm could be readily mitigated by a prompt filing of a new ICAP charge by ISO-NE. The $8.75 charge was intended solely as an interim measure due to the inadequacy of record evidence to support a different charge. Nonetheless, the Commission encouraged the ISO to present another proposal within 90 days. ISO-NE can seek waiver of the notice requirement for tariff revisions, *see* 16 U.S.C. § 625d(d), so as to allow the proposal to go into effect sooner. Such a filing could reduce, if not obviate, any claimed potential harm.

Id. at 8 (citations omitted).

In its restructured interim ICAP proposal submitted in response the Commission's invitation, the ISO characterizes its filing as follows: "[i]n keeping with the Commission's concerns, and based on extensive discussion with NEPOOL participants and state regulators, the ISO proposes to restructure Installed Capability as a product and to impose a substantial deficiency charge. . . ." ISO-NE June 4, 2001 Compliance Filing at 1. The ISO further explains that its interim proposal is based on a compromise proposal that had wide support at NEPOOL. *Id.* at 11-12. In addition, the ISO has added certain features to the compromise proposal. *Id.* The ISO proposes that its charge become effective on August 1, 2001.[4]

Because the ISO accepted the Commission's invitation, the Commission now has the opportunity to consider a different proposal for an interim ICAP charge to replace the admittedly

[4] The Movants will address the merits of the proposal in separate filings.

interim $8.75 charge. The ISO states that its proposal seeks to "revise Installed Capability as a product and implement a substantial deficiency charge, to enhance the reliability function served by the Installed Capability Requirement. *Id.* at 3. The Commission should now focus its attention and resources on expeditiously considering the newly proposed restructured interim charge (as permitted by the First Circuit's remand order) rather than addressing the numerous issues raised in opposition to the $8.75 charge.

B. A Separate Proceeding for the Case on Remand Would be Divisive and Duplicative

As stated earlier, the First Circuit directed the Commission, if it retains the $8.75 charge, to provide a better explanation for its decision. The Court states in remanding that "the immediate impact of those orders is high and FERC's errors and omissions are troubling." *Central Maine Power*, slip op. at 30. Thus, the Commission must justify that a substantial ICAP charge is warranted. *Id.* In doing so, Movants would expect the Commission to fully examine, at the very least, the data already before it regarding: (1) the current cost of a peaking unit; (2) prices in the ICAP bilateral market (before gaming occurred); (3) the amount of available capacity *currently* available or under construction and whether these plans were being undertaken and pursued when ICAP was trading at a fraction of the $8.75 charge; (4) the structural flaws in the current ICAP bilateral market; (5) the revenue available to generators from the energy and reserves markets; and (6) the fundamental structural changes, such as divestiture and market rather than cost of service rates, that occurred as a result of wholesale and retail electric restructuring in New England so as to make the grafting of the pre-competition $8.75 charge inappropriate.

As the Commission is well aware, there is voluminous and hotly contested data on these matters that will require careful consideration by the Commission. The amount of litigation that

has already occurred over the $8.75 charge argues against committing further Participant and Commission resources to trying to justify the $8.75 charge or develop a new charge based on the parties' earlier submissions (including requests for rehearing) when a new proposal has already been developed by the ISO and that proposal is currently before the Commission. Instead the Commission should expeditiously consider the ISO's June 4, 2001 filing.

C. The Current Deficiency Charge Should Remain in Place Until the Effective Date of the Replacement Interim Deficiency Charge

The current $0.17 deficiency charge should remain in effect until the effective date of the replacement Interim Deficiency Charge. The ISO has proposed that the charge become effective on August 1, 2001. Movants agree that this is an appropriate effective date for the new interim ICAP product to go into effect.

Changing the deficiency charge at the time of the effective date of the new interim ICAP product is the proper course of action because: (1) imposing the $8.75 deficiency charge for one month prior to the proposed implementation of a restructured ICAP product will not incent the construction of new generation; and (2) imposing the $8.75 deficiency charge on July 1, 2001 would not provide sufficient notice for imposition of the $8.75 charge.

The Commission has stated that "the most important concern is to develop a charge that provides an incentive to build adequate capacity and bring down prices in the long term." *ISO New England Inc.*, 94 FERC at 61,847. While the ISO states that its proposal is intended "to enhance the reliability function served by the Installed Capability requirement," ISO-NE June 4, 2001 Compliance Filing at 3, imposing the $8.75 charge for a month prior to the effective date of the restructured interim ICAP product can serve no useful purpose and certainly will not incent the construction of new generation.

Further, the imposition of a charge with less than a month's notice would impose a hardship on consumers, a hardship that is especially unfair in light of the active role taken by consumers in working with the ISO and NEPOOL participants to develop an alternate ICAP charge consistent with the Commission's directive.[5] Imposing a charge that is almost twice the highest level of deficiency charge proposed by the ISO will punish these consumers by forcing them to buy at greatly inflated prices to meet their July ICAP obligation. This punishment is exacerbated by the retrospective nature of the ICAP deficiency charge. Because Load Serving Entities ("LSEs") do not know the amount of their ICAP obligation until the end of the month for which the obligation applies,[6] there is an ever-present risk of under-purchasing ICAP unless an entity purchases significantly more ICAP than it expects it will need. Thus, an LSE suddenly faced with the prospect of an imminent $8.75 deficiency charge will have the choice of purchasing extra ICAP at prices inflated by the one-month $8.75 charge or being subject to the even higher charge if it does not buy more than it expects to need. These extra costs will of course be borne by consumers. Such a result only promotes further instability in the wholesale markets and, as stated earlier, meets none of the Commission's objective in retaining an ICAP requirement.

[5] These efforts are discussed in the ISO Compliance Filing at 11. *See also ISO New England Inc.*, Docket Nos. EL00-62-000 *et al*., "Motion of New England Conference of Public Utilities Commissioners to Lodge Document" (April 20, 2001) (lodging NECPUC resolution resolving, *inter alia*, that NECPUC "shall immediately collaborate with all sectors of the electric industry to encourage, facilitate, and foster efforts to find a balanced, just and reasonable settlement of the ICAP proceeding . . . .").

[6] *See* ISO-NE June 4, 2001 Compliance Filing at 15.

III. CONCLUSION

For the reasons stated above, Movants respectfully request that: (1) the above-captioned proceedings be consolidated; (2) the Commission expeditiously consider the ISO's June 4, 2001; filing; and (3) the current deficiency charge remain in place until August 1, 2001, the requested effective date of the ISO's proposed replacement ICAP charge, or such other later date ordered by the Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document by first-class mail upon each party on the official service list compiled by the Secretary in these proceedings.

Dated at Washington, D.C., this 15th day of June, 2001.

John E. McCaffrey